

United States Department of the Interior
Office of Hearings and Appeals
139 East South Temple, Suite 600
Salt Lake City, Utah 84111

August 18, 1999

PASCUA YAQUI TRIBE	:	IBIA 98-61-A
OF ARIZONA,	:	
Appellant	:	
	:	Indian Self-Determination Act
v.	:	
	:	Appeal from a decision dated October 20,
ACTING DIRECTOR, TUCSON	:	1997, by the Acting Director, Tucson Area
AREA OFFICE, INDIAN HEALTH	:	Office, Indian Health Service, Tucson,
SERVICE,	:	Arizona
Appellee	:	

RECOMMENDED DECISION

Appearances: Philip Baker-Shenk, Esq., and Christopher A. Karns, Esq., Washington, D.C., and Thomas Peckham, Esq., Minneapolis, MN, for Appellant

Barbara Hudson, Esq., Rockville, Maryland, and Tamara M. Ribas, Esq., San Francisco, California, for Appellee

Before: Administrative Law Judge Kuzmack

On June 1, 1999, Mr. Donald F. Garrett, Member Departmental Appeals Board, Department of Health and Human Services, issued a Final Decision in the above-captioned matter. In his decision Mr. Garrett remanded the matter for a further review with respect to:

“ . . . the Dental Service's Competent of the Contract Health Services PFSA since [the Administrative Law Judge] failed to determine how the Secretarial amount should be calculated or whether IHS should be required to assign a dentist to provide services under the contract for this PFSA. I also remand the case to the Administrative Law Judge to make a determination as to the cost of the residual functions of the area office for purposes of determining the Secretarial amounts for the Administration and Management and Chief Medical Officer PFSA's.

On July 2, 1999, during a telephone conference, both parties agreed that no further briefing or evidence was necessary. Both parties agreed to rely on the eight-day hearing record

and their extensive briefings, pre-hearing, post-hearing and pre-appeal.

After a full review of all briefings and evidence, and for the reasons stated below, the following findings are made: (1) the IHS-determined Secretarial amount of \$4,313,836 for all of the Contract Health Services (CHS) components, including Dental Services, is appropriate and the IHS properly declined to fund the Tribe's CHS proposal in excess of that amount, (2) the IHS properly declined the Tribe's proposal to assign a dentist from the commissioned officers of the Public Health Service to perform services, and (3) IHS failed to "clearly demonstrate" that its determination of 19.65 full-time equivalent positions (FTE's) at \$1,397,865.70 for the pertinent residual functions (i.e., all residual functions exclusive of those performed by the Environmental Services Branch) was reasonable and appropriate. IHS did not "clearly demonstrate" the validity of the grounds for partially declining the contract proposal based upon said figures for the residual functions. 25 U.S.C. § 450f(e)(1). Further, the residual should be 12.51 FTE's for the pertinent residual functions.

I.

Dental

A.

The Secretarial Amount

On page 22 of the Recommended Decision, I delineated the various components of CHS, including the HMO program and Dental Service, identified the total funding of \$9,721,263 proposed by the Tribe for the various CHS components,¹ and noted that "IHS determined that the Secretarial amount for CHS was much less: \$4,311,836." On page 29, I concluded that "the IHS-determined Secretarial amount of \$4,313,836 for CHS is upheld as appropriate and the IHS properly declined to fund the Tribe's CHS proposal in excess of this amount."

At pages 21 through 23 of Judge Garrett's Decision, he misconstrues this conclusion as applying only to the funding for the HMO component of CHS when, in fact, it applied to the total funding for all of the CHS components. He states:

* * * I conclude that the ALJ did not err in finding that the Secretarial amount of \$4,313,836 determined by IHS for the HMO component of the [CHS] PFSA was correct based on the amount of recurring funds that IHS allocated to the Tucson Area Office for this component during the period in which the Tribe submitted the proposed self-determination contract. * * *

* * * * *

¹ I also identified the funding proposed by the Tribe for the individual components of CHS, including home health services. The proposed amount for that component was incorrectly identified as \$50,453. The actual proposed amount was \$8,625.

Although the ALJ listed Dental Service as a component of the [CHS] PFSA, the ALJ did not specifically address the calculation of the Secretarial amount for this component. Moreover, in listing \$185,178 as the Tribe's proposed amount for this component, the ALJ ignored the fact that the Tribe increased the proposed amount in the proceedings before him and that the increased amount was calculated based on a different methodology (i.e., a three-year average) than the original amount.

I therefore conclude that "the matter should be remanded to the ALJ for a determination * * * of the proper Secretarial amount for the dental Service component of the [CHS] PFSA.

I now reaffirm that the IHS-determined Secretarial amount of \$4,313,836 for all of the CHS components is upheld as appropriate and that the IHS properly declined to fund the Tribe's CHS proposal in excess of this amount. The hearing record shows that the Secretarial amount (the amount the Secretary would have otherwise provided) of \$4,313,836 was properly derived from and is equal to the total recurring allowance for CHS in FY 1997, the most recent year for which data was available at the time of issuance of the declination letter (Tr. 221-23, 927-334, 956-57, 1208-09, 1469-70; Ex. CC).

The record further shows that Dental Service and the HMO program are the only two components of CHS for which recurring allowances are tabulated (Ex. CC; Tr. G120, 927-34). The sum of the respective recurring allowances in FY 1997 for those two components, \$185,178 and \$4,128,658, equals the total recurring allowance of \$4,313,836 for CHS (Ex. CC).²

No specific amounts are reserved or allocated for the non-HMO components of CHS (other than Dental Service) (Tr. G120). Delivery of services for those components is made in accordance with a medical priority guidelines and then the bills for those services are simply paid as they are received by IHS until the relevant fund is exhausted (Tr. G12-17, G120, 347-55, 934-38). The relevant fund for Dental Service is the Dental Service recurring allowance and the relevant fund for the other non-HMO components is the HMO program recurring allowance (*id.*). If the relevant fund is exhausted, delivery of non-HMO CHS services, including Dental Service, is deferred or funding is sought from other sources, such as the CHS Reserve Fund or the Emergency Fund (Tr. 347-55, 934-38).

² The recurring allowance for Dental Service in FY 1997 is listed as \$183,848 in Exhibit 16, as \$210,584 in Exhibit NN, and as \$185,178 in Exhibit CC. The record shows that \$185,178 is the correct amount and that \$4,313,836 is the correct amount for all CHS (Tr. 927-34, 1208-09).

The Tribe references Exhibit 16 as evidence that the funds allocated for Dental Service varied greatly during the three-year period from FY 1995 through FY 1997. That exhibit identifies the following amounts as obligated funds for Dental Service for the Tribe for FY 1995, FY 1996, and FY 1997: \$219,985, \$763,848, and \$208,848, respectively. Based upon those figures, the average annual amount obligated was \$397,560.

Ronald Wood, the Tucson Area Office (TAO) Acting Area Director, and Elizabeth Guerra, the TAO Health Systems Specialist, testified that one valid way to determine the Secretarial amounts for non-HMO CHS services is to calculate the average funding for the last three years and that this method was, in fact, used to determine amounts for the non-HMO CHS services available to the Tribe in post-declination discussions with the Tribe (Tr. 453, 1156, 1208-09; Ex. 88). Relying upon this testimony, the Tribe argues that the Secretarial amount for Dental Service should be based on the three-year average calculated from Exhibit 16.

The Tribe's argument must be rejected for several reasons. First, the content and context of Exhibit 16 was never adequately explained or discussed through questioning of IHS personnel. The exhibit was apparently acquired during discovery and then presented by the Tribe, but it never questioned IHS personnel regarding the circumstances of its preparation or the accuracy or meaning of the figures contained therein.

Second, and more importantly, the actual recurring funding for Dental Service and for CHS as a whole remained fairly constant for the three-year period at approximately \$180,000 and \$4,300,000, respectively (Ex. NN; Tr. 927-30). As explained by Ms. Guerra, and as was the case for the HMO program, the Secretarial amount for Dental Service is properly based on the amount of recurring funds that IHS allocated to TAO for that PFSA (Tr. 1208-09).

The record is replete with evidence that the amount the Secretary would have otherwise provided is limited to the amount of recurring funds for the PFSA in question, Dental Service (see, e.g., Tr. 221-23, 927-38, 956-57, 1208-09, 1469-70). The fact that IHS may obtain additional funding from other funding sources in any given year, as it did for Dental Service in FY 1996 and for the HMO program in FY 1997, does not mean that it can be forced to do so in the future.

If the CHS Reserve Fund or other separate fund were used to increase the amount awarded to the Tribe under the ISDA, that amount could not be reduced in subsequent years, except under very limited circumstances. See 25 U.S.C. § 450j-1(b). IHS would be forced to take funding from some other tribe or program to continue funding the Tribe's ISDA contract at the increased level while still maintaining the CHS Reserve Fund or other separate fund.

Such a reallocation of funding cannot be forced upon IHS. Those funds are, and were, unavailable for distribution to the Tribe under the ISDA. They are not funds which the Secretary would have otherwise provided to the Tribe for such recurring funding.

Significantly, the testimony was that using a three-year average was just one possible method of determining the Secretarial amounts.³ In actuality, the amount the Secretary would have otherwise provided for Dental Service and the HMO program (including the non-HMO services which are funded from the HMO recurring allowance) are the amounts of recurring funds that IHS allocated to TAO for those CHS components for the single fiscal year during which the Tribe submitted the proposed self-determination contract. Those amounts were \$185,178 and \$4,128,658, respectively, or \$4,313,836 in total CHS funding. Of course, those Secretarial amounts should be adjusted to reflect any change in the allocations for those components (such as the additional \$1.5 million allocated to TAO for the HMO program) during the period before the Tribe actually contracts to assume responsibility for those components.

B.

The Proposal for Assignment of a Commissioned Officer

Another issue on remand is whether IHS properly declined the Tribe's proposal to assign a dentist from the commissioned officers of the Public Health Service to perform services under the Tribe's self-determination contract. 42 U.S.C. § 215 authorizes the detailing of commissioned officers of the Public Health Service to certain specified entities. The ISDA extended the list of specified entities to include Indian tribes as follows: "In accordance with subsection (d) of section 215 of this title, upon the request of any Indian tribe * * *, commissioned officers of the [Public Health] Service may be assigned by the Secretary for the purpose of assisting such Indian tribe, * * * in carrying out the provisions of contracts with * * * tribal organizations pursuant to" the ISDA. 42 U.S.C. § 2004b. IHS declined this portion of the Tribe's proposal under section 102(a)(2)(C) of the ISDA, which provides for declination where "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." The declination letter stated that "there are no Commissioned Officers currently assigned to perform PFSA's which the Tribe proposes to assume, or any positions associated with those PFSA's." At the hearing, IHS clarified that a commissioned officer performs services for the TON which are funded with monies allocated for

³ The usefulness and purpose of calculating three-year averages of obligated funds appears related to the nature of the non-HMO components other than Dental Service. The funding for at least some of them varies from year to year because the funding is not set by TAO via a recurring allowance for each component but changes based upon the availability of funding from the HMO program recurring allowance, medical priorities, and utilization (Ex. 88; Tr. 347-55, 927-38, 1162-66, G12-17). Dental Service, on the other hand, has its own recurring allowance.

Even if a three-year average of funds obligated for Dental Service were relevant, the total CHS funding which IHS would be required to provide to the Tribe under the ISDA is limited to the total amount of recurring CHS funds. That amount was \$4,313,836 at the time of declination, as IHS properly determined.

the benefit of the TON alone, so that the basis for the declination was that the Tribe was proposing to contract for staffing which TAO did not have or fund (Tr. 990, 995-96, 1012-13).

The IHS' declination of the Tribe's proposal to assign a dentist is upheld. IHS correctly argues that nothing in the ISDA requires IHS to create and fund a program or position for which the Tribe may then contract. See Native American Center of Recovery v. Indian Health Service, Decision No. CR 293 (Department Appeals Board, 1993). The ISDA does not mandate but merely authorizes IHS to assign commissioned officers for purposes of assisting an Indian tribe.

II. THE RESIDUAL AMOUNTS

25 U.S.C. § 450f(a)(2)(E) recognizes that under an ISDA contract certain activities cannot be provided by the contracting tribe, but must be performed by the government. These activities are referred to as “inherently federal activities”, “inherently governmental activities” or, in the governmental vernacular, “residual functions” (Exs. OO, PP).

Under the ISDA, tribes are entitled to those portions of the IHS Area Office and Headquarters funds above the level necessary to pay for the residual functions. The amount necessary to pay for those functions is known as the residual. Amounts above the residual are distributed to the tribes as they contract to take over those functions in proportion to that tribe's population as compared to the total relevant tribal population.

Whether an activity is inherently governmental is a matter for agency determination and possible review by the Office of Personnel Management (Ex. OO, 57 Fed. Reg. 45101). In the present case, there is no dispute as to which functions are inherently federal activities (see, e.g., Tr. 605-07), but the amount of funding required to carry out those residual functions is contested.

In 1995 TAO formed a workgroup to coordinate computation of TAO's residual (Tr. 591-92). The workgroup developed a worksheet to be completed by each TAO employee (Tr. 592, 860). On the worksheet each employee detailed the functions he or she performed and the hours spent on each function (Tr. 592-94; Ex. RR). To maximize accuracy and minimize the potential bias of employees to overestimate the amount of time spent on residual functions, the workgroup did not tell the employees the purpose of the worksheets and relied upon and consulted with supervisors who oversaw completion of the worksheets (Tr. 592-95, 867-69, 878-81, 970-71; Ex. TT, p. 3).

The workgroup then categorized the various functions identified on the worksheets as residual or non-residual and used the worksheet time data to estimate the workload for all residual functions (Tr. 593-94, 880). They arrived at a residual estimate of 22.65 FTE's (Tr. 595; Ex. B, p. 8; Ex. C, pp. 3-4).

In so doing, they followed IHS policy by assuming that TAO would be working in a 100% ISDA contracted/compacted environment, where the tribes would enter into ISDA contracts or compacts for all non-residual functions (Court Ex 4: Tr. 611). In that environment there would be three contracts to handle: an ISDA contract with the Tribe, an ISDA contract with TON, and a contract to service the Urban Group, as administration of that contract is a residual function (Tr. 647, 692-93).

In November 1995 TAO presented its work on the residual to the Tribe and TON for discussion (Tr. 646, 881-82, 1037). No agreement on a residual was reached (Tr. 1037). Negotiations on the residual were renewed after submittal of the Tribe's contract proposal, but again no agreement was reached (Tr. 648, 654, 986).

In its contract proposal the Tribe proposed a residual of \$894,886 based upon staffing of 11.25 FTE's, including 1.00 FTE and \$80,988 for the Office of Environmental Health and Engineering (OEH&E), also known as the Environmental Services Branch. However, the Tribe did not propose to contract for the functions carried out by the Environmental Services Branch so the residual for those functions need not be determined. In comparison, at the time of declination, TAO determined the residual for all functions, exclusive of those performed by the Environmental Services Branch, to be \$ 1,397,865.70 based upon staffing of 19.65, FTE's (Ex. B, p. 8; Ex. C, pp. 3-4).

At the time of the declination, TAO was in the process of updating its 1995 residual estimate (Tr. 497-99, 771, 1057). Because the process had not yet been completed, TAO relied upon the 1995 estimate of 22.65 FTE's and then subtracted the FTE's (3) for the Environmental Services Branch to arrive at a total of 19.65 FTE's (Tr. 585, 888, 1837-38; Ex. B, p. 8; Ex. C, pp. 3-4). The 1995 salaries, fringe benefits, and other costs associated with the residual estimate of 19.65 FTE's were adjusted to reflect increased costs in 1997 (Tr. 887-88; Ex. B, p. 8).

There was extensive testimony from expert and lay witnesses concerning the methodology that IHS used to determine the residual positions and FTE's it deemed necessary. There was also extensive testimony disputing IHS's methodology and resulting determination.

An expert witness is allowed to testify as to his or her opinions if they "will be likely to aid the trier [of fact] in the search for truth." ⁴ Expert testimony is allowed to "assist" the finder of fact, not to substitute his or her opinion for that of the finder of fact. ⁵ The expert must "possess sufficient skill, knowledge and/or experience in his or her field to convince the court

⁴ Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962).

⁵ Cleary, McCormick's Law of Evidence, sec. 13.

her opinion will sufficiently aid the finder of fact in finding the truth.”⁶ In the instant matter parties for both sides agreed to the expert status of the expert witnesses who testified. The expert may draw inferences from facts in evidence and offer them to the finder of fact. The finder of fact can accept or reject those inferences.⁷

The finder of fact has the obligation to determine whether or not any witness is credible and, if credible, how much, if any, weight to give that witnesses testimony.⁸ In administrative hearings the trier of fact and the trier of law are the same person.⁹

IHS and the Tribe offered "experts" in residuals. IHS called Eric B. Broderick, D.D.S., M.P.H., the Principal Dental Consultant to IHS, who has worked for IHS for 24 years and recently has acted as an "Area Residual Mediator" on special assignment for four area offices in five negotiations with tribes regarding residuals (T. 558-564). Dr. Broderick functioned as a reviewer of the approach, process, and analysis used by the Areas to establish their residuals in order to determine if the Areas had established their residuals in a reasonable manner. Dr. Broderick, along with two employees of the IHS Phoenix Area Office, conducted such a review of TAO's work on its residual (Tr. 563-67, 1038--39).

Dr. Broderick and his colleagues concluded that TAO's approach and analysis for estimating its residual were thorough and that its conclusions were reasonable (Tr. 569-70). In a one and one-half page memorandum to IHS' Deputy Director, Dr. Broderick stated that "while there was some room for refinement and the area is prepared to negotiate those aspects of the estimate which fall within the grey zone, the overall approach taken by the staff seems reasonable." (Ex. WW)

The Tribe offered Thomas L. Austin, D.M.D., M.P.H., who is retired from IHS and has consulted with Indian Tribes since his retirement in 1994. He served as the lead negotiator for eight of the first fourteen self-governance compacts for the IHS and for nine self-governance compacts for the IHS Portland Area Office. As a consultant to many tribes, he has been involved in several ISDA negotiations and studies (Ex. 2).

The Tribe's Executive Director of Health Programs, Reuben Howard, also testified regarding TAO's residual. He worked for IHS for approximately 20 years, including 12 years in

⁶ Id.

⁷ Id.

⁸ Richardson on Evidence, 10th Edition, Prince, sec. 123.

⁹ Cleary, McCormick Law of Evidence, sec. 348.

a supervisory role with TAO and several years as the Acting Director of the Office of Tribal Self-Governance (Ex. 1). He was involved in nearly 100 negotiations of self-governance compacts (Tr. 1541).

Dr. Austin and Mr. Howard collaborated in the preparation of the Tribe's residual proposal of 11.25 FTE's (Tr. 2045-46). They modeled the proposal upon the residual numbers of the IHS Nashville Area Office, as they were developed recently and Dr. Austin was involved in the tribal negotiations from which they were developed (Tr. 2083, 2087).

When questioned about the value of comparing TAO's residuals to the residuals of other IHS Area Offices, such as Nashville, Dr. Broderick acknowledged that residual workloads are somewhat dependent upon an Area's tribal population and the geographic distribution of that population, but he ultimately dismissed any possibility of meaningful comparison as being problematic and "dangerous" (Tr. 634-35, 638, 657-59, 673, 704-05). Dr. Broderick implied that the Nashville Area residual numbers were not as good as TAO's "analyzed" residual numbers because Nashville's numbers, like most residuals, were the product of consultation, negotiation, and compromise (Tr. 662-69).

He acknowledged that the Nashville Area, like all Areas, based its "opening" position upon "hard analysis", but he opined that in the typical residual negotiation the Area analysis is superseded by an agreement between the parties (Tr. 661-63, 666, 668). He explained that when both sides in a negotiation have analyzed the residual and arrived at disparate numbers, the negotiation usually consists of agreeing on an intermediate number and adjusting the residual positions and dollar amounts accordingly (Tr. 584, 663-64). He concluded that it was not reasonable to compare the negotiated Nashville Area residual to the TAO-determined residual because the Nashville residual is based upon compromise (Tr. 665).

He characterized such compromises as being based upon "no real justification or analysis" and opined that it would be irresponsible for an Area "to knowingly set a residual below what was known it * * * honestly took to carry out the job." (Tr. 668, 813) The implication is either that all such compromises result in "irresponsible" residual numbers or that Dr. Broderick does protest too much about the use of Area comparisons in determining residuals. The latter implication appears to be the more reasonable one.

Dr. Broderick further decried the use of Area comparisons because many variables and intangibles come into play, such as the complexity of the PFSA's in that Area and the degree of tribal independence or interaction (Tr. 635-36, 704-05). Additionally, he distrusted residual projections because the people making the projections lacked experience in the complex projection process and often overlooked, underestimated, or overestimated residual components (Tr. 635-36). He observed variability in residuals among Areas which seemingly could not be explained by comparisons of population or other tangible factors (Tr. 633-35). He observed, however, that the variability was much less than in the past (Tr. 616); the implication being either

or both that Areas were learning from experience or each other or that various residual guidelines developed over the past several years were helping to reduce variability.

Confusingly, one of the reasons he characterized as "dangerous" a comparison of TAO's residual with Nashville's residual was that Nashville had the benefit of some experience in projecting residuals and operating in an ISDA contracted and compacted environment (Tr. 658-59). Presumably, that experience would make Nashville's residual a more reliable and valuable source of relevant information, and not something to be shunned or ignored.

One set of residual guidelines recently developed is the Draft Recommendations for the Establishment of Area Office Residual Functions and Resources ("Draft Guidelines") (Court Ex. 2). Those guidelines were available to TAO prior to the declination of the Tribe's proposal (Tr. 575).

The Draft Guidelines invite examination of the characteristics of an Area in determining its residual. The following factors are listed as potentially having an impact on the "final determination of residual amounts":

- a. Number of Tribes/Tribal agreements
- b. Number of Communities
- c. Geographic size of Area
- d. Presence/absence of Tribal consortia
- e. Number of urban programs
- f. Regional treatment centers
- g. Area specific federal responsibilities (Haskell, Diabetes or other special projects, program formula resources, etc.)
- h. Special relationships with non-indigenous Indian populations

It follows that a comparison of TAO's characteristics relative to the TAO-determined residual with the characteristics of other Area Offices relative to their residuals would be relevant and material to the determination of TAO's residual.

Generally, the evidence presented by IHS suffers from a lack of any analysis based on the characteristics of the Tucson Area, including the number of tribes (two), the number of communities (three or four), the geographic size of the area (very small), the number of urban programs (one), the absence of tribal consortia, the number of regional treatment centers, and any specific projects or any special relationship with non-indigenous Indian populations, all of which are identified as factors listed in the Draft Guidelines as potentially having an impact on the "final determination of residual amounts." Dr. Broderick acknowledged that the Tucson Area is so small that IHS has considered combining it with the Phoenix Area (Tr. 782), yet he ignored or treated as unimportant the absence of analysis of the foregoing factors. Most of those factors are size measurements which bear upon the level of effort required to carry out the residual functions.

Instead of analyzing the factors in the Draft Guidelines and TAO's characteristics relative to those of other Area offices, TAO and Dr. Broderick relied nearly exclusively on the worksheet data. Robert Price, TAO's Tribal Affairs Officer, testified that TAO did look at other Area Offices (Tr. 1028-29), but neither he nor any other IHS witness elaborated with any significant detail.

They relied upon the worksheet data despite the acknowledged bias of IHS employees to overestimate on the worksheets the amount of time spent on residual functions (Tr. 594-95). Dr. Broderick stated that the Workgroup attempted to maximize accuracy and minimize the potential for bias by not disclosing the purpose of the worksheets to the employees and by relying upon and consulting with supervisors who oversaw completion of the worksheets (Tr. 592-95; see also Tr. 867-69, 878-81, 970-71; Ex. TT, p. 3). Nevertheless, the hours estimated are certainly inflated to some extent because each employee totaled his or her hours to 2,080 per year, as if no time was wasted in each 40-hour work week chatting about or attending to matters unrelated to work.

Further, the worksheets are not the product of contemporaneous logging of hours spent on activities, but rather, are estimations based on recollections. While the worksheets are useful, the estimated hours amount to best guesses, as Mr. Austin pointed out (Tr. 2061-62, 2085-86).

The Draft Guidelines indicate that specific reasoning for each residual function is needed to determine a residual. Other than the worksheets, which are a starting place for such analysis, there is little or no evidence that specifically demonstrates the reasoning behind the TAO-determined residual numbers.

Dr. Broderick testified that there was no formula to determine residuals (Tr. 582). However, he opined that there is a "critical mass" needed for any area office (Tr. 633). This critical mass is not found in the Draft Guidelines or in any document presented by IHS, but is the number Dr. Broderick has decided that is necessary in order for any area office to "meet the . . . responsibilities of an area office." (Tr. 640-641, 780). He stated that the critical mass is somewhere between 15 and 20 or, alternatively, that an area office might not meet its responsibilities with a residual below 20 (Tr. 633, 637, 640-641). However, Dr. Broderick failed to specify those responsibilities, except in a most general way.

IHS provided Exhibit PP, "The Report of the Joint IHS Tribal Residual Workgroup," which recommends a minimum of 12-15 FTE's per Area (Ex. PP, p. 9). IHS therefore has impeached the "critical mass" testimony of its own witness.

Given the characteristics of the Tucson Area, TAO's total residual ought to fall somewhere within or near the recommended minimum range of 12-15 FTE's. Among other characteristics, TAO has only two tribes and a tribal population of 20,000. In comparison, other

Areas referenced during the hearing have 2, 12, 10 to 20, 20 to 30, or 100 tribes and tribal populations of 30,000, 60,000, 80,000, or 250,000 (Tr. 613-14, 634, 673-74, 783-86). The other Area with only two tribes, the Navajo Area, is the Area with a population of approximately 250,000, which is more than tenfold greater than TAO's population (Tr. 613-14). TAO's jurisdiction extends only across the southern third of Arizona, whereas the Nashville Area Office's jurisdiction spans 13 States (Tr. 673-74). This evidence strongly suggests that the residual for TAO should be one of the lowest, if not the lowest.

An analysis of TAO's specific residual numbers corroborates that TAO's residual should be approximately 15 FTE's in total or 12.51 FTE's, exclusive of the 3 FTE's for the Environmental Services Branch. The staffing for TAO's Contracts & Grants Branch in 1997, its residual staffing determined by TAO, and its residual staffing proposed by the Tribe were as follows:

<u>Position</u>	<u>1997 FTE's</u>	<u>Residual (TAO)</u>	<u>Residual (Tribe)</u>
Supv/Sr Contract Spec	1.0	0.65	1.0
Contract Specialist	1.0	1.06	
Procurement Tech	3.0	1.12	
Procurement Clerk	1.0	1.00	

(Ex. C, p. 3; Ex. A, p. 13).

The TAO-determined residual of 3.83 FTE's to handle the two ISDA contracts and one Urban Program contract is greater than the Nashville Area's contracts branch residual of 2.4 FTE's to handle over 20 ISDA contracts (Tr. 2064-65). The Nashville ratio of approximately 1.0 FTE's for every 10 contracts is consistent with the IHS Portland Area Office's experience, as recounted by Dr. Austin, that each contract specialist administered, on average, 10 contracts per year (Tr. 2058-60). Applying this ratio to TAO's anticipated three contracts results in an estimate of 0.30 FTE's for contract specialists.

According to Dr. Broderick, TAO's contracts branch residual determination was based upon the following projected workload in a 100% contracted/compacted environment: 75 contract actions and 1,000 acquisitions (Tr. 620-21). However, this projection is not supported by any substantial analysis. Dr. Broderick did not know if it was based upon administration of the two ISDA contracts and one Urban Group contract only or a combination of ISDA contracts and non-ISDA contracts, such as procurement contracts (Tr. 695). More importantly, there is little or no delineation of the types of contracts and acquisitions handled in the present environment, their complexity, or the time and effort required to handle the various types. Nor is there any analysis of the number and types that would remain TAO's responsibility in a 100% contracted/compacted environment. TAO and Dr. Broderick provided only unsubstantiated projections.

In 1997 TAO's contracts branch handled 104 contract actions and approximately 3,000 acquisitions (Tr. 620-21), while administering 20 to 30 contracts for the provision of health care services (Tr. G14, G102-03). This equates to approximately 3 to 5 contract actions per contract. Dr. Austin testified that administration of a typical contract involves no more than 3 contract actions per year (Tr. 2058-59). Thus, the evidence shows that the administration of 3 contracts in a 100% contracted/compacted environment would likely involve no more than 9 to 15 contract actions.

In general, TAO's oversight of ISDA contracts is minimal, according to Elizabeth Guerra, TAO's Health Systems Specialist (Tr. G36-37). The ISDA limits IHS to one monitoring visit per year for each ISDA contract unless the contracting tribe requests additional visits or IHS has reasonable cause to believe that "grounds for resumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist." Section 1(b)(7)(C) of the Model Contract at 25 U.S.C. § 4501(c). Further, for each ISDA contract, only one, up-front, payment to the contracting tribe is typically made annually unless a modification occurs that requires an additional payment or the contracting tribe requests another method of payment (Tr. 694, 774-78, 2055-60). 25 U.S.C. § 4501(c).

IHS argues that it has the additional responsibility to handle non-ISDA contracts and grants for which tribes may apply, citing 25 U.S.C. §§ 1621h(d), (h), (k), and (m), 1665g, and 1680k; but presumably its estimate of 75 contract actions per year accounted for such other contracts and grants. In any event, IHS provided no specific evidence regarding the expected workload, if any, for such non-ISDA contracts and grants.

Dr. Broderick opined that it is an oversimplification to say that the administration of an ISDA contract annually involves only one visit and one payment (Tr. 774-78). In support thereof, he referenced the amount of time expended by TAO's contracts branch on the Tribe's proposal before any contract has been awarded (Tr. 775). However, in a 100% contracted/compacted environment, the time spent on contract proposals would presumably be limited to proposals for modifications. Dr. Broderick also referenced the fact that the level of complexity and workload for contracts varies (Tr. 775), but he provided no analysis of the potential complexity or workload expected for the three anticipated contracts for the Tribe, TON, and the Urban Group.

IHS correctly argues that modifications of each ISDA contract can be expected, but it provided no data on the average number of modifications for ISDA contracts. It did present two ISDA contracts with the Tribe, one with 10 modifications and one with 17 modifications (Exs. Y and Z), but there is no indication that these contracts are typical. Further, the modifications occurred over a two-year period and many were simple. For instance, one modification for each contract merely transferred responsibility for payment under the contract from one IHS division to another. Several others for each contract simply made funds available for a new fiscal year or new funding period. Three of those were issued in FY 1996 in apparent response to the

incremental nature by which much of the Government was funded in FY 1996 because of legislative gridlock regarding appropriations.

There is some evidence regarding average or expected workloads. Dr. Broderick testified that the President's Council has established guidelines which set forth the annual workload expected of a Contract Specialist (Tr. 621). That testimony, as transcribed by the court reporter, identified the expected workload to be 125 contract actions; but Dr. Broderick's related testimony shows that he actually identified the expected workload to be 25 contracts actions per year (Tr. 621). That expected workload is consistent with Dr. Austin's testimony that each contract specialist in the Portland Area Office administered, on average, 10 contracts per year and that the typical contract involved no more than 3 contract actions per year (Tr. 2058-60). This evidence supports a finding that a residual of 0.5 FTE's for a GS-13 grade¹⁰ contract specialist would be more than adequate to handle the anticipated three contracts involving approximately a dozen contract actions.

The expected workload for a procurement technician under the guidelines is 1,200 acquisitions, according to Dr. Broderick (Tr. 621). Application of these guidelines to TAO's unexplained projection of 1,000 acquisitions in a 100% contracted/compacted environment results in a residual of 0.83 FTE's for procurement technicians. Thus, the total FTE's for the contracts branch ought not to exceed 1.333 FTE's.

Dr. Broderick did testify that a regulation, in order to prevent waste, fraud, and abuse, requires a division of labor in the handling of contracting so that the person who issues payment for items is not the same person who ordered the items and that the person who solicits a contract is not the same person who awards the contract (Tr. 615, 619, 762-764). However, the latter purported requirement would not apply to an ISDA contract, as IHS does not solicit the contract. Further, Dr. Broderick did not identify the regulation and such regulation could not be found. Even if he is correct, the purported regulation does not affect the determination of the appropriate residual for the contracts branch because both he and Dr. Austin acknowledged the possibility that personnel performing other functions could be trained to handle some contracting functions or that personnel could be shared by more than one Area (see, e.g., Tr. 623-24, 1717, 2045).

With regard to residual staffing for the Division of Health Services Delivery, TAO determined that one FTE was necessary for a Chief Medical Officer (CMO) and 0.95 FTE's was required for a Program Analyst. The Tribe countered that only one FTE for a GS-13 grade Health Systems Specialist was required.

¹⁰ The Nashville residual, the Tribe's proposed residual, and the TAO-determined residual all contain a GS-13) grade contract specialist position. A GS-13 grade for the contract specialist was selected herein because of this congruence.

According to Dr. Broderick, the functions of the CMO are to provide expert medical advice to the Area Director, to represent and advocate for TAO before the larger IHS and Federal communities regarding allocation of health resources, to establish goals and priorities in health matters, to coordinate efforts in addressing epidemics, to review and authorize proposals to conduct human subject research, and to monitor 61 health objectives (Tr. 609-11, 699-703, 783-85). Mr. Wood elaborated that the CMO would provide assistance in the oversight of the health programs taken over by the tribes (Tr. 482). However, neither of them discussed why a Program Analyst was needed in addition to a CMO.

The Tribe's expert, Dr. Austin, echoed that CMOs generally serve such functions but opined that one was not needed at TAO (Tr. 2046-48). He explained that much of a CMO's responsibilities involve "supporting and overseeing the quality assurance activities, medical staff, staffing, formulary development, and those kind of direct medical-care things that involve the [Federal] operations that are going on at [the service units] in an Area." (Tr. 2047) Because there would be no Federal health care service operations in a 100% compacted/contracted environment to oversee, evaluate, or monitor, Dr. Austin opined that a CMO was not necessary (Tr. 2046-47).

Dr. Austin did acknowledge that some large Areas with large numbers of tribes provide for a CMO in their residual to cooperate and collaborate with the tribes to determine and document unmet needs, to plan for future program development and budget requirements, and to address legislative concerns (Tr. 2047-48). Because TAO is a small Area with only two tribes, Dr. Austin opined that the level of effort required for such activities was much lower and did not justify inclusion of a full-time doctor as part of the residual (*id.*). Mr. Wood implicitly acknowledged that a full-time CMO was not needed when he agreed that if the Phoenix Area Office had a CMO position in its residual, then that CMO might be able to serve both areas (Tr. 482).

As it stands now, the Phoenix Area has one full-time CMO to monitor and oversee several ISDA contracts and health services for 10 to 20 tribes, including some IHS direct service facilities (Tr. 783-86). It defies logic to say that TAO also needs a full-time CMO to handle its residual functions relating to only three contracts involving three tribal groups, with no Federal operations to oversee.

In summary, IHS has failed to clearly demonstrate that the residual for the Division of Health Services Delivery should include a Program Analyst, a full-time CMO, or even a part-time CMO. In fact, the larger Nashville Area, with over 20 tribes, proposed and negotiated a residual which includes a GS-13 grade Health Systems Specialist and no CMO (Tr. 2064). An examination of the evidence presented by both parties reveals no convincing reason as to why the Tribe's proposal of one FTE for a GS-13 grade Health Systems Specialist is not sufficient to handle the residual functions of TAO's Division of Health Services Delivery.

For the Personnel Management Branch, TAO estimated a residual of 2.14 FTE's, consisting of 0.50 FTE's for a GS-13 grade Personnel Officer, 0.14 FTE's for a GS-13 grade Personnel Staff & Specialist, 0.50 FTE's for a GS-05/07 grade Personnel Clerk, and 1.0 FTE's for a GS-07 grade Computer Assistant (Ex. QQ). Two additional FTE's for computer-related positions (a GS-07 grade Computer Assistant and a GS-14 grade Supervisory Computer Systems Analyst) are estimated for the Information Systems Operation Branch (id.).

In contrast, the Nashville Area established a residual of one FTE (a GS-11 grade Personnel Specialist) for its personnel branch and one FTE (a GS-07 grade Computer Specialist) for computer-related positions. Dr. Broderick testified that the workload for personnel positions was dependent upon the number of employees (Tr. 615). Nashville's residual of 22.1 FTE's is virtually identical to the TAO-determined residual of 22.65 FTE's and TAO's residual is inflated. Consequently, the residual FTE's for TAO's Personnel Management Branch and Information Systems Branch ought not to exceed the comparable FTE's for the Nashville Area, i.e., one GS-11 grade Personnel Specialist and one GS-07 grade Computer Specialist.

With respect to secretaries, Dr. Broderick testified that they could be pooled (Tr. 626, 629). The TAO-determined residual, exclusive of the Environmental Services Branch, provides for 3.07 FTE's for secretarial positions (Ex. QQ). In contrast, the Nashville residual includes 1.40 FTE's for exclusively secretarial positions (GS-05 grade) and 1.0 FTE's for a GS-09 grade Executive Secretary/Equal Employment Opportunity (EEO) position. In its ISDA contract proposal the Tribe also included 1.0 FTE's for a GS-09 grade Executive Secretary/EEO position (Ex. A, p. 13). For EEO, the TAO-determined residual provides 1.0 FTE's for a GS-11 grade Management Analyst. Given that TAO is substantially smaller than Nashville in every characteristic adduced at hearing: residual FTE's, number of tribes, tribal population, and geographic scope, Nashville's residuals for secretarial and EEO positions establish the maximums for those positions in TAO's residual. Thus, TAO's residual should be modified to replace the 3.07 FTE's for secretaries and 1.0 FTE's for an EEO Management Analyst with 1.40 FTE's for GS-05 grade secretaries and 1.0 FTE's for a GS-09 grade Executive Secretary/EEO position.

For the Office of Area Director, TAO determined the residual to be 3.23 FTE's, exclusive of the secretarial positions already discussed. The 3.23 FTE's is comprised of 1.0 FTE's for an Area Director, 1.0 FTE's for a Public Health Advisor, 1.0 FTE's for an Administrative Officer, and 0.23 FTE's for a Special Assistant. In addition to the 1.0 FTE's for an Executive Secretary/EEO position previously mentioned, Nashville's residual and the Tribe's residual proposal for the Office of Area Director include the following:

	<u>Nashville FTE's</u>	<u>Tribe's Proposed FTE's</u>
Area Director	1.0	1.0
Public Health Advisor	0.0	0.0
Administrative Officer	1.0	1.0
Special Assistant	1.0	0.0

TAO never presented any specific explanation as to the need for a Public Health Advisor. Again, its residual should be limited to Nashville's residual in the absence of compelling evidence to the contrary. Therefore, the 1.0 FTE's for a Public Health Advisor and 0.23 FTE's for a Special Assistant should be replaced by 1.0 FTE's for a Special Assistant.

The remaining residual amounts determined by TAO appear reasonable in light of Nashville's figures and other relevant evidence. TAO included in its residual 0.5 FTE's for a General Supply Specialist (Ex. QQ). Both Nashville and the Tribe included FTE's for similar positions. In its residual Nashville provided 0.8 FTE's for a Purchasing & Supply Management position and the Tribe proposed 1.0 FTE's for a Support Services Specialist. TAO's estimate of 0.5 FTE's appears reasonable in light of this evidence.

Finally, the TAO-determined residual for its Financial Management Branch is 2.28 FTE's, consisting of 0.28 FTE's for Budget Officer, 1.00 FTE's for a Budget Analyst, and 1.0 FTE's for an Accounting Technician (Ex. QQ). This appears reasonable in light of Nashville's residual numbers (1.0 FTE's for a Budget Officer, 1.0 FTE's for a Budget Assistant, and 1.0 FTE's for an Operating Accountant), and the recommendations of a report prepared by the Director of the Division of Financial Management (Ex. DDD). That report recommends financial management residuals for each Area Office (id.). For TAO, it recommended a residual of 3.0 FTE's.

In light of many factors, including but not limited to those listed immediately below, IHS has failed to clearly demonstrate that the residual should be 19.65 FTE's, exclusive of the Environmental Services Branch residual of 3 FTE's:

- (1) The Joint IHS Tribal Residual Workgroup's recommended minimum residual range of 12 to 15 FTE's;
- (2) The smallness of the Tucson Area in terms of the relevant factors;
- (3) Dr. Broderick's opinion that a residual of 15 to 20 might be reasonable;
- (4) TAO's clearly excessive estimates of the residuals for the Contracts and Grants Branch, Division of Health Services Delivery, Personnel Management Branch, Information Systems Operation Branch, Office of Area Director, and pool of secretaries;
- (5) The comparisons with other Areas; and
- (6) The short shrift which IHS and Dr. Broderick gave to the relevant factors and Area comparisons.

The weight of the evidence dictates that the residual for all functions, exclusive of those performed by the Environmental Services Branch, should be 12.51 FTE's. When the TAO determined residual of 3 FTE's for that branch is added on, the total residual approximates 15 FTE's, which comports with both the IHS recommended minimum residual range of 12-15 FTE's and Dr. Broderick's estimated range for "critical mass" of 15-20 FTE's.

Those 12.51 FTE's translate into a dollar figure of \$823,393.93 as follows:

<u>Position</u>	<u>FTE's</u>	<u>GS Grade</u>	<u>Salary & Operating Costs</u>
Director	1.00	SES	\$161,000.00
Special Assistant	1.00	GS-13	\$ 91,831.57
Administrative Officer	1.00	GS-12/14	\$ 66,959.81
Exec. Secretary/EEO	1.00	GS-9	\$ 61,503.15*
Budget Officer	0.28	GS-12	\$ 20,216.45
Budget Analyst	1.00	GS-11	\$ 68,673.42
Accounting Technician	1.00	GS-07	\$ 34,387.74
Senior Contract Spec.	0.50	GS-13	\$ 37,218.92
Procurement Tech.	0.83	GS-07	\$ 37,421.55
Computer Specialist	1.00	GS-07	\$ 44,364.42
Personnel Specialist	1.00	GS-11	\$ 57,684.71
Secretary	1.40	GS-05	\$ 36,762.35
Gen. Supply Specialist	0.50	GS-09	\$ 22,696.34
Health Systems Spec.	1.00	GS-13	\$ 82,673.50*
Total	12.51		\$ 823,393.93

(* All dollar figures, except those marked were taken or calculated from TAO's figures in Ex. QQ. Each figure marked (*) was based upon the Tribe's estimate for salary and benefits plus operating costs of an additional 15%, as TAO did not provide a figure for that position and grade.) Of course, the residual dollar figures should be adjusted to reflect any change in costs through the period immediately before the Tribe actually contracts to assume responsibility of the PFSA's in question.

Nicholas T. Kuzmack
Administrative Law Judge